(2)

No. 95-1540

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

BUBBA HOKE, BARRY GRESHAM and WALKER COUNTY, TEXAS,

Petitioners,

vs.

JED BLUDWORTH and JONELL BURNETT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ZIPT

QUESTION PRESENTED

Respondents, Jed Bludworth and Jonell Burnett, do not concur with petitioners' statement of "questions presented." The due process issue which petitioners now seek to present to this Court was never presented to the Court of Appeals in any fashion. In fact, the phrase "due process" never appears in any pleading or brief filed by petitioners in the court below. Accordingly, respondents urge that the following constitutes a more accurate articulation of the substantive question arguably properly presented by this Petition for Writ of Certiorari:

1. Whether a district court has discretion to strike an untimely answer and to render judgment by default where there has been a willful disobedience to a court's repeated instructions to file an answer, and where the pleading ultimately untimely filed is found by the district court to be a prohibited general denial not filed in good faith, violative of the requirements of FED. R. CIV. P. 8 and 11?

LIST OF INTERESTED PARTIES

The petitioners are Bubba Hoke, Barry Gresham, and Walker County, Texas. Petitioners' counsel of record are J. Preston Wrotenbery, William S. Helfand, and Marla A. Moore of Hirsch, Robinson, Sheiness & Glover, P.C., who also represented petitioners in the courts below.

The respondents are Jed Bludworth and Jonell Burnett. Respondents were represented at trial by the late Harry H. Walsh, III and by Gerald M. Birnberg of Williams, Birnberg & Andersen, L.L.P. Respondents' counsel of record in this Court are Gerald M. Birnberg and Matt E. Rubin of Williams, Birnberg & Andersen, L.L.P.

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In The Supreme Court of the United States

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BUBBA HOKE, BARRY GRESHAM, and
WALKER COUNTY, TEXAS,
Petitioners,

v.

JED BLUDWORTH and JONELL BURNETT,
Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS JED BLUDWORTH AND JONELL BURNETT

Respondents request that the Court deny the petition for writ of certiorari seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit. Pursuant to Fifth Circuit local rule 47.5.1, the Court of Appeals' opinion was not published, but it appears at appendix "A" to the petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners now (for the first time in this case) attempt to assert a deprivation of procedural due process of law, in violation of the Fifth Amendment to the Constitution of the United States,

as their primary claim justifying review by this Court. Petitioners did not raise this issue at any point before the Court of Appeals, and it is not, therefore, not properly before the Court.

Even if the issue as presented were proper for resolution, however, respondents do not concur that the case involves any due process concerns because petitioners' answer was not stricken, and judgment was not rendered, "solely on the basis of a minor procedural mistake by a litigant's attorney," as petitioners claim. (Petition at 2, 5; See pp. 6, 7). Rather, the judgments of the courts below were predicated on Fed. R. Civ. P. 55, to which petitioners properly advert, and also upon the effect of Fed. R. Civ. P. 8(b), which prohibits general denials not filed in good faith. In relevant part, that rule provides as follows:

> **(b) Defenses; Form of Denials . . .**
>
> Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

RESPONDENTS' STATEMENT OF THE CASE

In their statement of the case and reasons for allowance of the writ, petitioners assert that both the district court's striking of petitioners' answer and rendering of an interlocutory judgment by default (or "nil dicit") on liability, and the Court of Appeals' affirmance of those discretionary decisions, were predicated "solely on the basis of a minor procedural mistake committed by their counsel." (Petition at 5). Neither of the judgments in the courts below may fairly be read to have been predicated on this ground.

What the record actually reveals is that the district court determined to strike petitioners' untimely answer after being "compelled" to the conclusion "that their unexplained delay was willful and dilatory conduct serving only to complicate the judicial process." (App. C: 14a-15a). Contrary to the portrayal of events in the petition, the district court actually found that the failure to answer was not due to some "minor" oversight, but rather to deliberate and conscious decision of the petitioners designed intentionally to frustrate the judicial process. Moreover, the "answer" ultimately filed (more than eleven months late and after repeated instructions from the court for petitioners to file one earlier) (*Id.*: 14a), amounted to nothing more than a prohibited general denial "not made in good faith", according to the district court. (*Id.*: 15a-16a). The Court of Appeals affirmed this ruling, finding neither clear error nor an abuse of discretion in these express determinations (App. A: 4a-5a).

Pursuant to United States Supreme Court Rule 15.2, therefore, respondents are constrained to bring these misstatements of fact and law to the Court's attention, and to submit their alternative statement of the case.

Course of Proceedings and Disposition of the Case Below

This civil action was filed on February 10, 1993 by plaintiffs/respondents, Jed Bludworth and his mother, Jonell Burnett, complaining of an unprovoked and brutal assault by Walker County sheriff's deputies, petitioners/defendants Donald Hoke and Barry Gresham (the "deputies"), allegedly committed pursuant to an official custom or policy of Walker County, Texas (the "county"). (R. 1:9)[1]. Plaintiffs alleged claims under 42 U.S.C. § 1983 for violation of rights secured to them by the Fourth and Fourteenth Amendments to the Constitution of the United States.

On March 9, 1993, the deputies and the county filed an unopposed motion for extension of time to file responsive pleadings, (R. 3:13), which was granted, allowing them until March 22, 1993, "to file responsive pleadings to Plaintiffs' Original Complaint." (R. 3:14). On that date, the petitioners filed a motion to dismiss, asserting, among other grounds, that acts of unprovoked assault and verbal and physical abuse do not violate clearly established law. (R. 3:24). The motion was denied on May 24, 1993. (R. 3:37).

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[1] The record on appeal comprises three volumes. References to the record volume shall be indicated as "R. ___". Page references shall be indicated by a colon after the reference to the record volume as "R. ___:___". The transcript of proceedings comprises volumes 4-6 of the record. References to pages within the transcript shall be made according to the internal pagination of the transcript as filed. References to any materials in the appendix to the Petition shall be indicated as "App. ____". Page references shall be indicated by a colon after the reference to the appendix as "App. ____: ___".

As a result of the overruling of their Rule 12(b)(6) motion to dismiss, the petitioners' answer was due to be filed by June 7, 1993. FED. R. CIV. P. 12(a)(4)(A). The deputies and the county neither filed an answer, nor requested a further extension on or before that date.

Thereafter, at various pre-trial conferences, the district court repeatedly directed the respondents to file an answer. (App. C: 14a). By April 11, 1994 — more than ten months later — they still had not done so.

On April 11, 1994, the district court entered an order setting the case for trial on May 24, 1994. (R. 3:50). Not until May 17, 1994 did petitioners file their "original answer and jury demand." (R. 3:103). This document merely generally denied "each and every one of the factual allegations" contained in plaintiffs' eight page, 52 paragraph original "petition" (R. 3:9-1), except for three inconsequential matters, which were admitted[2].

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[2] The answer admitted that Walker County is located in the Southern District of Texas, that the individual defendants were Walker County sheriff's deputies, and that the deputies responded to a call at the plaintiffs' residence on the date and time alleged. (R. 3:103-02, ¶ 3, 4). The answer denied, among other incontrovertible facts, the assertions that venue was proper in the Southern District of Texas; that the United States district court possessed jurisdiction to decide a § 1983 case; the citizenship and residency of the parties; the fact that the original call was made to Huntsville Memorial Hospital; the deputies' handcuffing of plaintiff Bludworth; the use of force in subduing Bludworth and placing him in the patrol car; that upon arrival at the Walker County Jail, Bludworth was handcuffed and shackled and placed in a padded cell; and that the only sanitary facility in that cell was a hole in the floor.

On May 19, plaintiffs moved to strike petitioners' original answer for its failure to comply with Rule 8(b). (R. 3:123). In their supplemental motion to strike the answer, plaintiffs requested that a default judgment be entered. (R. 3:125). Upon receiving those pleadings, the court continued the May 24 trial setting and on July 12, 1994, it struck the petitioners' answer, rendered an interlocutory judgment "nil dicit" (App. B) against them with regard to liability, and ordered a trial on damages. A supporting opinion was issued, (App. C), in which the district court observed,

> [t]he defendants were also told several times in pre-trial conferences to answer. The facts compel the conclusion that the defendants' delay was willful. They have no explanation for the eleven-month delay. The defendants' dilatory conduct serves only to complicate the judicial process.

(App. C: 14a).[3] The district court further grounded its order on petitioners' abuse of Rule 8(b), stating

> [w]hen the defendants finally did see fit to answer Bludworth's complaint, they filed a qualified general denial. Although general denials are appropriate in limited circumstances, the defendants' use of a general denial here is manifestly improper, for there had been a hearing on a motion to dismiss and much discovery completed, allowing the defendants to know

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[3] Petitioners claimed in the court below that this finding was erroneous, but the Court of Appeals failed to uphold this argument and the "question presented" to this Court does not complain of the sufficiency of the evidentiary basis for this factual determination.

> everything they needed to answer fully and precisely . . . It is impossible to believe that the defendants, in good faith, deny all but a minute portion of Bludworth's 53 paragraph complaint. After all, they had sixteen months of discovery to learn what they could admit or deny.

(App. C: 15a).

At this point, petitioners moved to set aside the judgment nil dicit and belatedly — more than two months after the deficiencies in their "answer" had been expressly brought to their attention by respondents' motion to strike, and almost two weeks after entry of the judgment — finally sought leave to file an amended answer (R. 2:207), a proposed amended answer (R. 2:214), and an amended motion to set aside the judgment (R. 2:228). The motion to set aside was denied, (R. 2:241, 275), the case proceeded to trial, and a jury assessed damages in the amounts set forth in petitioners' statement. By separate order, the court awarded attorney's fees pursuant to 42 U.S.C. § 1988.

An appeal to the Fifth Circuit ensued. In an unpublished opinion, the Court of Appeals concluded that the district court had not abused its discretion either in striking petitioners' answer, in rendering judgment on liability, or in concluding that petitioners' failure to answer in a timely or proper fashion had been willful. (App. A: 4a-5a).

REASONS FOR DENYING THE WRIT

I. Petitioners Failed to Present their Constitutional Arguments to the Courts Below

Petitioners' primary argument is that they have been deprived of procedural due process of law, in violation of the Fifth Amendment to the Constitution of the United States, by

virtue of having judgment entered against them "nil dicit" as a result of what they inaccurately describe as a simple "mistake" by their lawyer. Petitioners' constitutional argument makes its first appearance in this Court: in neither their briefs below nor in their motion for rehearing in the Court of Appeals is there any such claim so much as adverted to, nor a single allusion to a deprivation of due process of law as a basis for appellate reversal. Petitioners simply and totally failed to present this constitutional claim to the Court of Appeals (or, for that matter, to the district court). This deficiency is, in and of itself, sufficient reason for denying the writ.

"[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"). This Court's established practice is to refrain from addressing issues not presented to the Court of Appeals. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). *See generally* R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 6.26 (7TH ED. 1993). The petitioners' failure to raise an issue at any point in the Court of Appeals, when brought to this Court's attention by a respondent's brief in opposition, precludes that issue from being reached or resolved by this Court. *E.E.O.C.*, 476 U.S. at 24. There is, accordingly, no reason to grant the writ since petitioners' due process claims, having never been presented to the Court of Appeals, are not properly before this Court for decision.

II. The Factual Underpinning of the Judgments Below Are Inappropriate for this Court's Further Review

Although petitioners have belatedly attempted to clothe this case with constitutional trappings, the only question actually presented is whether the district court acted within its discretion in finding that petitioners had willfully obstructed the judicial process by disobeying the court's repeated directions and the applicable rules of civil procedure, where the Court of Appeals found neither abuse of discretion nor clear error in the trial court's factual determinations in this regard. Petitioners effectively seek from this Court yet another review of the factual sufficiency of the trial court's findings, which were reviewed and upheld by the Court of Appeals.

The factual review sought by petitioners is not an appropriate exercise for this Court. Findings of a trial court which are affirmed on appeal do not merit reconsideration and attention by this Court:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 336 U.S. 271, 275, *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, rev'd in part*, 339 U.S. 605 (1950). This Court properly accords great weight to the fact-findings made by a district court and approved by a Court of Appeals. *N.C.A.A. v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984). Thus, Supreme Court review is unwarranted.

Moreover, it is highly unlikely that other litigants or their counsel would repeat the disobedience of a court's explicit

instructions to answer, or the express limitations of Rule 8(b) restricting the use of general denials, to the extent found by the courts below to have justified the district court's judgment in this case. Re-examination of the factual inquiry into the events leading to this result simply would not be an appropriate utilization of this Court's limited resources.

III. There Are No Unsettled Issues of Federal Law Properly Raised By This Case

A. Counsel's willfulness, bad faith, and delay is attributable to petitioners

Petitioners assert that this Court has never addressed the issue of whether a district court may constitutionally render a default against a party as a result of his or her attorney's failure to file a timely and proper answer. In truth, this Court has repeatedly held that a party's case can be dispositively affected — even to the client's extreme prejudice — by a lawyer's actions, inactions, or other decisions or derelictions in the course of litigation. Just three terms ago, for example, the Court expressly re-affirmed the long-established principle that "clients must be held accountable for the acts and omissions of their attorneys," even if the consequence of that conduct is dismissal of a lawsuit. *Pioneer Inv. Services v. Brunswick Assoc.*, 507 U.S. 380 (1993).

Indeed, this Court has never wavered from its insistence that litigants "be held accountable for the acts and omissions of their chosen counsel." *Id.* The most extreme example of this imputation involves death penalty cases, where the Court has repeatedly held that trial counsel's decisions are binding on a client even if they cost him his life, *see, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984). The same outcome obtains even if a crucial, case-determinative default was the result of pure inadvertence of counsel. *Murray v. Carrier*, 477 U.S. 478 (1986).

Coleman is particularly instructive here. In that case, the Court found no constitutional violation where petitioner was denied substantive review of serious federal constitutional claims because of the "inadvertent error," 501 U.S., at 749, of his lawyer in being three days late in filing a notice of appeal (even in a death penalty case). Surely, if due process is not offended by a death sentence where the court refuses to consider significant constitutional claims solely because of counsel's inadvertent three-day lapse in filing a procedurally required pleading, it cannot be affronted by a nil dicit judgment in a civil case where there has been an eleven month delinquency despite repeated warnings.

B. This Court has already determined this issue

More directly, and contrary to petitioners' assertion that this Court has never addressed this issue, the very argument presented here (to the effect that it is legally unsustainable to visit adverse consequences on a litigant on account of the errors of its lawyer) was decisively rejected by this Court more than 30 years ago. In *Link v. Wabash R. Co.*, 370 U.S. 626, 633 (1962), this Court ruled,

> [t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . .

In other contexts, devastating consequences to the litigants have regularly been upheld when counsel's errors have transgressed procedural mandates. For example, if counsel files a petition for certiorari out of time, the Court attributes that untimeliness to the petitioner and will deny the petition without requesting an explanation from the petitioner before acting. *Link*, 370 U.S. at 634 n.10. *See also, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 133 (1992) (upholding Rule 11 sanctions against party because "plaintiff's counsel 'create[d] a blur of absolute confusion'" and because of counsel's "careless pleading"); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (upholding dismissal of lawsuit on account of "counsel's 'callous disregard' of their responsibilities"). *See generally, Link v. Wabash R. Co.*, 370 U.S. at 634 n.10.

"[There is n]o procedural principle that is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). Where a right to contest allegations in a complaint is lost as a result of counsel's failure timely to comply with the procedural rules established for joining (and limiting) issue, no novel or constitutional principles are implicated. Rather, petitioners' remedy, if they have one, lies not with this Court in these circumstances, but, as *Link* observes and teaches, "against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

At all events, this Court has addressed the very claims petitioners assert here — as long ago as *Link v. Wabash* (1962) and as recently as *Pioneer v. Brunswick* (1993) and there is simply no compelling reason to re-visit such clearly and established law.

IV. The Fifth Circuit Judgment Is Correct and No Further Review of That Decision by This Court is Warranted

The Fifth Circuit Court of Appeals reviewed the district court's judgment of default for abuse of discretion and its subsidiary findings of fact for clear error. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63-64 (5th Cir. 1992). An intentional or willful failure to answer alone constitutes sufficient cause to uphold the default judgment. *Matter of Dierschke*, 975 F.2d 181, 184-85 (5th Cir. 1992). Based upon the petitioners' unexcused delay in filing their answer, conjoined with petitioners' violation of Rule 8(b), the Court of Appeals determined both that the district court's findings were not clear error, and that the court had not abused its discretion in entering the judgment of default. (App. A: 4a-5a).

Litigants are not free to test the limits of the trial court's patience, to disregard repeated warnings, and to flout the applicable rules of civil procedure with impunity. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 641-42. Flagrant bad faith and counsel's callous disregard of their responsibilities will justify the most extreme action. *Id.* at 643. Under the circumstances of this case, the Court of Appeals was correct in concluding that the district court had not abused his discretion.

V. There Is No Conflict of Decisions Among the Circuits

Petitioners finally argue that the Fifth Circuit's affirmance of the district court's judgment "conflicts with other cases of similar facts." (Petition at 9). The direct answer to this argument is that the claimed conflict simply does not exist. On the contrary, in none of the cases cited by petitioners were the Courts of Appeals presented with specific findings of disobedience of court orders, willful delay, and bad faith filings of general denials, approaching those with which the Fifth

Circuit was confronted in this case and which form the basis of the district court's judgment.

The question is not, of course, whether this Court, or even the Court of Appeals, would as an original matter have taken the same action, but rather, whether the district court abused its discretion in so doing. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. No Court of Appeals has ever adopted the rule urged by petitioners that the derelictions of counsel and failure to comply with the Federal Rules of Civil Procedure cannot result in entry of a judgment nil dicit, consistently with the Constitution's requirements of procedural due process. And, of course, no inter-circuit conflict over constitutional interpretation is implicated here because, among other reasons, the Fifth Circuit was never asked to address, and never purported to decide, any constitutional question in this case. Moreover, the decisions upon which petitioners rely simply did not involve an exercise of discretion in circumstances even remotely comparable to those presented by the record in the present case. Therefore, there is no conflict — let alone one deserving attention by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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